IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
May 16, 2007 Session

CHERIE D. BAIRD TEAGUE v. STEVEN PAUL TEAGUE

Appeal from the General Sessions Court for Campbell County
No. 11463 Joseph M. Ayers, Judge

No. E2006-02386-COA-R3-CV - FILED MAY 31, 2007

At an earlier time, the trial court granted Cherie D. Baird Teague ("Wife") a legal separation from Steven Paul Teague ("Husband"). Five years later, Husband filed an "Answer and [Counterclaim]" in the legal separation proceeding seeking an absolute divorce. Wife filed a motion to dismiss the counterclaim predicated upon her assertion that both of the parties were then living in a different county. The trial court granted the motion. Husband appeals. We affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the General Sessions Court Affirmed; Case Remanded

CHARLES D. SUSANO, JR., J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., and SHARON G. LEE, J., joined.

Johnny V. Dunaway, LaFollette, Tennessee, for the appellant, Steven Paul Teague.

Mandy M. Hancock, Knoxville, Tennessee, for the appellee, Cherie D. Baird Teague.

OPINION

I.

The parties were married in Las Vegas on June 25, 1999. In July 2001, Wife filed a complaint for legal separation in the trial court – the Campbell County General Sessions Court. At that time, both parties resided in Campbell County and Wife was expecting the parties' child. Wife alleged irreconcilable differences as her ground for separation. Husband filed an answer admitting all of Wife's allegations, except the allegation of irreconcilable differences. Husband did not object to the entry of an order for legal separation.

On August 1, 2001, the trial court entered an order for legal separation pursuant to T.C.A. § 36-4-102 (2005).[1] The court's order did not address the division of the parties' marital property, child custody, or child support, noting that "such issues shall be held in abeyance until a motion is made by either party to deal with such issues." The parties' child, Alexander Dale Teague, II, was born on September 2, 2001.

On August 4, 2006, Husband filed an answer and counterclaim under the docket number of the proceeding in which the legal separation had been granted. This time, Husband admitted all the allegations in Wife's complaint for legal separation, including the allegation that irreconcilable differences existed between the parties. The "answer" section of the pleading recites that Husband "elects to convert the legal separation into an absolute divorce based upon the [counterclaim] he is filing in this cause." In the "counterclaim" section of his pleading, he alleged cruel and inhuman treatment, inappropriate marital conduct, and irreconcilable differences as grounds for divorce. Husband's counterclaim lists the date of the parties' final separation as June 2006. Both parties resided in Knox County when this pleading was filed.

On August 7, 2006, Wife filed a complaint for divorce in the Knox County Circuit Court. Wife did not mention the trial court's order for legal separation but stated that the parties had been separated "[o]n and off since July 2001." Wife alleged inappropriate marital conduct and irreconcilable differences. Husband then filed a motion to dismiss Wife's complaint in the Knox County Circuit Court for lack of jurisdiction and because "the parties ha[d] a prior suit pending in the Campbell County General Sessions Court."

On September 11, 2006, Wife filed a motion to dismiss the counterclaim filed by Husband in the trial court. Wife asserted that the Campbell County General Sessions Court was not the proper venue for Husband's divorce complaint because, according to her, both parties reside in Knox

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[1] T.C.A. § 36-4-102, in pertinent part, provides as follows:

> (a) A party who alleges grounds for divorce from the bonds of matrimony may, as an alternative to filing a complaint for divorce, file a complaint for legal separation. Such complaint shall set forth the grounds for legal separation in substantially the language of § 36-4-101 [,*i.e.*, the statute setting forth the grounds for divorce,] and pray only for legal separation or for such other and further relief to which complainant may think to be entitled. The other party may deny the existence of grounds for divorce but, *unless the other party specifically objects to the granting of an order of legal separation*, the court shall declare the parties to be legally separated.

(Emphasis added).

County. *See* T.C.A. § 36-4-105(a) (2005).[2] In response, Husband asserted that venue was proper in the Campbell County General Sessions Court because that court had "continuing jurisdiction to determine a division of assets and establish a Permanent Parenting Plan."

In October 2006, the trial court held a hearing on Wife's motion. The court granted the motion, finding that venue did not exist in Campbell County. From the bench, the trial court stated the following:

> I think that essentially the final Order – the [order for legal separation] that was put down back in 2001 was a final Order. I do realize there were some issues that were reserved, but I think otherwise it's a final Order . . . .

The court thereafter entered an order granting Wife's motion. Husband appeals, challenging the propriety of that order.

II.

Our standard of review of a trial court's decision on a motion to dismiss is as follows:

> In considering a motion to dismiss, courts should construe the complaint liberally in favor of the plaintiff, taking all allegations of fact as true, and deny the motion unless it appears that the plaintiff can prove no set of facts in support of [the] claim that would entitle [the plaintiff] to relief. In considering this appeal from the trial court's grant of the defendant's motion to dismiss, we take all allegations of fact in the plaintiff's complaint as true, and review the lower courts' legal conclusions *de novo* with no presumption of correctness.

Stein v. Davidson Hotel Co., 945 S.W.2d 714, 716 (Tenn. 1997) (citations omitted).

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[2] T.C.A. § 36-4-105(a) provides that

> [t]he bill or petition [for divorce or annulment] may be filed in the proper name of the complainant, in the chancery or circuit court or other court having divorce jurisdiction, *in the county where the parties reside at the time of their separation, or in which the defendant resides*, if a resident of the state; . . .

(Emphasis added). Husband's counterclaim recites Knox County addresses for both he and Wife and, as previously mentioned, lists the date of the parties' final separation as June 2006. The counterclaim does not state where the parties resided at the time of their final separation. Presumably, they lived together in Knox County after the legal separation decreed by the trial court on August 1, 2001.

III.

Husband contends that the trial court erred when it found that it was not the proper venue for his divorce action. Specifically, he argues that the court erred in holding (1) that the 2001 order for legal separation was a "final [o]rder" and (2) that the court did not have "continuing jurisdiction" over his divorce action.

Husband cites T.C.A. § 36-4-102(b) to support his argument that the trial court had jurisdiction to adjudicate his complaint for divorce. The relevant portions of that statute provide as follows:

> The court also has the power to grant an absolute divorce to either party where there has been an order of legal separation for more than two (2) years upon a petition being filed by either party that sets forth the original order for legal separation and that the parties have not become reconciled. The court granting the divorce shall make a final and complete adjudication of the support and property rights of the parties.

This provision has been construed as creating a ground for divorce – the legal separation of parties for more than two years with no reconciliation. *See* ***Abney v. Abney***, 433 S.W.2d 847, 849 (Tenn. 1968); ***Edmisten v. Edmisten***, No. M2001-00081-COA-R3-CV, 2003 WL 21077990, at *8 n.8 (Tenn. Ct. App. M.S., filed May 13, 2003).

In the ***Abney*** case, as in the instant case, the wife obtained an order awarding her a legal separation[3] from her husband. 433 S.W.2d at 848. More than two years later, the husband filed a petition for divorce in the court in which the wife had obtained the order for legal separation. ***Id.*** The husband filed his action for divorce pursuant to T.C.A. § 36-802 – the precursor to T.C.A. § 36-4-102(b). ***Id.*** In its discussion of the "legal separation" ground for divorce, the Supreme Court said the following:

[3] The ***Abney*** opinion uses the term "separate maintenance," rather than "legal separation." The two terms, along with a "divorce from bed and board" and a "limited divorce," are used interchangeably in the cases.

We think the paramount intent of the legislature in enacting this 1963 amendment to this Code section[4] can be found in statements made by Chief Justice Green in Lingner v. Lingner, 165 Tenn. 525, 56 S.W.2d 749 (1933). Chief Justice Green, after noting that a person living under a decree of limited divorce is in effect living in a world of enforced celibacy, neither married nor unmarried, said:

> Society is not interested in perpetuating a status out of which no good can come and from which harm may result. 165 Tenn. at 534, 56 S.W.2d at 752.

The intent of this amendment is to empower the courts to grant relief to persons finding themselves in such a situation.

There are no ambiguities in this 1963 amendment. *It simply empowers courts having divorce jurisdiction, upon a showing the criteria set out therein has been fulfilled authority to grant an absolute divorce.* This is, in effect, another cause or ground for divorce.

A decree of divorce from bed and board[5] or separate maintenance is not regarded as a final decree in the sense said decree upon petition of the party to whom it was awarded and proper showing may be changed, amended or modified as justice and equity may require. Cureton v. Cureton, 117 Tenn. 103, 96 S.W. 608 (1906); Riggs v. Riggs, 181 Tenn. 633, 184 S.W.2d 9 (1944). Under these decisions

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[4] T.C.A. § 36-4-102(b) has existed with essentially the same substance since 1963 when the following language was added to the statute:

> Provided, however, that the Circuit, Chancery or such other Court specially empowered to grant divorces shall also have the power to grant absolute divorces to either party where there has been a final decree for divorce from bed and board, or of separate maintenance for more than two (2) years, upon a petition being filed by either party that sets forth the original decree for divorce from bed and board, or separate maintenance, and that the parties have not become reconciled. The court granting the absolute divorce shall make a final and complete adjudication of the support and property rights of the parties.

1963 Tenn. Pub. Acts ch. 283; *see* T.C.A. § 36-4-102(b)

[5] An amendment in 1998 changed, among other things, "divorce from bed and board" to "legal separation." 1998 Pub. Acts ch. 1059.

> in regard to decrees for limited divorce and the language of this 1963 amendment *a petition for an absolute divorce filed relying upon said amendment is required to be filed in the court granting the limited decree.*
>
> Upon the court granting an absolute divorce under this 1963 amendment, the court is then empowered by the same amendment to adjust the support and property rights of the parties. *Since under other Code sections in regard to adjustment of property rights and support in divorce actions, such rights are affected by the fact of which party obtains the divorce, then construing this 1963 amendment in pari materia with these Code sections requires an absolute divorce under this 1963 amendment be awarded to the same party previously obtaining the limited divorce*.

Id. at 849. (Emphasis and footnotes added). In ***Abney***, the High Court concluded that the court did not have the authority to grant the husband a divorce pursuant to this ground because it was the wife who had been awarded the legal separation, rather than the husband. ***Id.*** at 850. The Court did state, however, that "[t]he decree awarding the wife separate maintenance can be changed to award the *wife* an absolute divorce." ***Id.*** (emphasis added).

Husband argues that T.C.A. § 36-4-102(b) and the Supreme Court's interpretation of that statute in ***Abney*** can be read as standing for the proposition that a court which enters an order for legal separation retains jurisdiction to grant an absolute divorce. First, it is important to note that the counterclaim filed by Husband in the trial court fails to allege a legal separation of more than two years as a ground for divorce. Rather, the complaint alleges cruel and inhuman treatment and inappropriate marital conduct pursuant to T.C.A. § 36-4-101(11) (2005) and, in the alternative, irreconcilable differences pursuant to T.C.A. § 36-4-101(14). It is incongruous that Husband can "piggy back" the "legal separation" proceeding when he fails to allege a legal separation for more than two years as a ground for divorce.

Husband's most basic contention on appeal is that the trial court erred in finding that its 2001 order for legal separation was a "final [o]rder." He argues that the order was not a final disposition of the case and that, therefore, the case was still viable when he filed his answer and counterclaim. According to him, this means that the trial court retained jurisdiction to entertain his counterclaim.

Husband cites a portion of a statement from the ***Abney*** opinion which provides that an order for legal separation "is not regarded as a final decree" as support for his contention that the court's order was not a final order. *See* 433 S.W.2d at 849. However, the sentence in ***Abney*** that Husband relies upon reads – in full – that an order for legal separation "is not regarded as a final decree in the sense said decree *upon petition of the party to whom it was awarded* and proper showing may be changed, amended or modified as justice and equity may require." ***Id.*** (emphasis added). The sentence cited by Husband cannot be read to mean that the "legal separation" proceeding is available

to the other party – the one who was not granted the decree of legal separation – as a vehicle for obtaining an absolute divorce.

We further note that, although either party to a marriage may seek a divorce pursuant to T.C.A. § 36-4-102(b), the ***Abney*** opinion clearly recites that a divorce can only be granted on the "legal separation" ground to the party to whom the legal separation had earlier been granted. 433 S.W.2d at 849. Husband argues that both parties were awarded the legal separation in this case and that, therefore, either party could be awarded a divorce pursuant to section 36-4-102(b). We disagree. Though the trial court did not specifically state in its order that it was awarding Wife the legal separation, the record supports such a finding. Wife is the one who filed the complaint seeking a legal separation. Furthermore, the court found that Wife had "met all of the requirements for an order of legal separation."

In summary, Husband's counterclaim was subject to dismissal for two basic reasons. First, he does not rely upon the ground of a legal separation for more than two years in his counterclaim. Second, he requests that the court grant *him* a divorce pursuant to a statute that was construed in ***Abney*** as limiting the granting of such a divorce to the person to whom the legal separation was granted.

As a separate argument, Husband seems to contend that the following language in the legal separation decree gives him the right to proceed: "no provision is made in this order for child custody or property issues, but such issues shall be held in abeyance until a motion is made by either party to deal with such issues." Husband misconstrues this language. The order merely recites that property, custody, and support issues are held in abeyance until, and if, one of the parties files a motion to have the court address those issues. Such a motion was never filed in this case by either party. Nowhere does the order state that the court retains continuing jurisdiction to entertain a complaint for divorce totally unrelated to the legal separation decree.

As an alternative to his argument that T.C.A. § 36-4-102(b) and the ***Abney*** case "allow[him] to file a [counterclaim] for divorce," Husband argues that Rules 13.02 and 15.01 of the Tennessee Rules of Civil Procedure authorize the filing of his complaint for divorce with the trial court. Tenn. R. Civ. P. 13.02 provides that

> [a] pleading may state as a counterclaim any claim against an opposing party, whether or not arising out of the transaction or occurrence that is the subject matter of the opposing party's claim.

Tenn. R. Civ. P. 15.01, in pertinent part, provides that

> [a] party may amend the party's pleadings once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been set for trial, the party may so amend it at any time within 15

> days after it is served. Otherwise a party may amend the party's pleadings only by written consent of the adverse party or by leave of court; and leave shall be freely given when justice so requires.

With respect to Rule 13.02, Husband asserts that, because "there were still pending issues to be decided before th[e trial court, he] was entitled to file his counterclaim for divorce." As to Rule 15.01, he argues that "[b]ecause there was never a pleading filed in response to [his original answer], he was entitled to amend his [a]nswer to include a counterclaim as a matter of course." We disagree with these assertions by Husband and find that these Rules do not apply to the current set of facts because the trial court had disposed of the action filed by Wife long before Husband filed his answer and counterclaim. "The long and short of it" is that the legal separation proceeding was over except for two contingencies: (1) a motion by a party asking the court to address property, custody, and child support issues, or (2) a request for an absolute divorce based upon a legal separation for more than two years. Neither contingency is implicated by the facts of this case. Rules 13.02 and 15.01 are not germane to the facts before us.

We hold that the trial court correctly held that its 2001 order for legal separation was a "final [o]rder" as far as Husband's counterclaim is concerned and that, according to T.C.A. § 36-4-105, the trial court was not the proper venue for Husband's counterclaim for divorce. Accordingly, we affirm the trial court's judgment granting Wife's motion to dismiss.

IV.

The judgment of the trial court is affirmed. This cause is remanded to the trial court for the collection of costs assessed below, all pursuant to applicable law. Costs on appeal are taxed to the appellant, Steven Paul Teague.

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CHARLES D. SUSANO, JR., JUDGE